

The Case for an International Anti-Corruption Court¹

EXECUTIVE SUMMARY



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Public corruption is endemic at the highest levels of government in many nations. Such “grand corruption” is costly, is closely correlated with the most serious abuses of human rights, and threatens the stability of many nations and the world. Grand corruption depends on a culture of impunity that exists because of the unwillingness of leaders to permit the honest and able investigation of their friends, families, and, indeed, themselves.

International efforts to combat grand corruption have been inadequate and ineffective. Similar circumstances concerning genocide and other egregious abuses of human rights led to the creation of the International Criminal Court (“ICC”) in 2002.

An International Anti-Corruption Court (“IACC”), similar to the ICC or as part of it, should now be established to provide a forum for the criminal enforcement of the laws prohibiting grand corruption that exist in virtually every country, and the undertakings that are requirements of various treaties and international organizations. Staffed by elite investigators and prosecutors as well as impartial judges, an IACC would have the potential to erode the widespread culture of impunity, contribute to creating conditions conducive to the democratic election of honest officials in countries which have long histories of grand corruption, and honor the courageous efforts of the many people, particularly young people, who are increasingly exposing and opposing corruption at great personal peril.

¹ Judge Wolf first proposed an International Anti-Corruption Court in Russia, at the 2012 St. Petersburg International Legal Forum, and received valuable advice on the proposal at the 2014 World Forum on Governance, convened by the Brookings Institution and Zaoštr'eno in Prague, Czech Republic.

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COMBATING GRAND CORRUPTION: THE NEED FOR A NEW INTERNATIONAL APPROACH

United Nations Secretary General Kofi Annan rightly wrote in 2004 that:

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.²

However, this rhetoric contrasts starkly with the reality of the ineffective international efforts to combat corruption.

The experience of the United States provides a model for a new international approach to combating corruption. Public corruption exists in the United States. State and local officials, particularly, at times abuse their public offices for private gain. However, in contrast to many other nations, the United States is serious about combating corruption.

In the United States, we do not rely on elected state prosecutors to do this because they are often part of the political establishment that must be challenged and, in any event, lack the necessary legal authority and resources. Rather, we rely primarily on federal investigators, prosecutors, and courts to pursue and punish corrupt state and local officials.

In the United States, sometimes acting on information provided by private parties who want to remain anonymous, independent media often expose corruption. Federal investigators are authorized to conduct undercover operations and secretly record conversations, and are adept at unraveling complicated financial transactions. Federal prosecutors are capable of trying complex cases successfully before impartial judges and juries. As a result, public officials convicted of corruption often receive serious sentences, which have the potential to deter others and to create a political climate in which good government is also good politics.

In many other countries, however, corruption is pervasive at the highest levels of the national government and is unpunished. Such misconduct has come to be known as “grand corruption,” which occurs “when ‘politicians and state agents entitled to make and enforce the law in the name of the people, are misusing this authority to sustain their power, status and wealth.’”³ Grand corruption depends on the existence of a culture of impunity. In countries with such a culture, there is neither the will nor the capacity to investigate, prosecute, and punish grand

2 Kofi A. Annan, *Foreword* to United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4, at iii (Oct. 31, 2003), available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

3 Global Org. of Parliamentarians Against Corruption, *Prosecuting Grand Corruption as an International Crime 2* (2013) (quoting *The Basics of Anti-Corruption*, U4: The Anti-Corruption Resource Center, <http://www.u4.no/articles/the-basics-of-anti-corruption> (2013)), available at http://gopacnetwork.org/Docs/DiscussionPaper_ProsecutingGrandCorruption_EN.pdf.

corruption. The enormous wealth obtained by corrupt officials in those countries is often laundered through a series of complex financial transactions, invested abroad, sometimes hidden, and sometimes enjoyed in appealing places by those officials.

Massive violations of human rights by high level officials in countries with a culture of impunity led to the creation of the International Criminal Court, in 2002, for the prosecution of genocide, crimes against humanity, and war crimes. An International Anti-Corruption Court, as part of the ICC or as an independent entity, is now equally necessary and appropriate because of the consequences of grand corruption.

Corruption is clearly costly. It has been estimated that \$1 trillion is paid in bribes annually, and the cost of all forms of corruption is more than 5% of global GDP.⁴ An estimated \$8.4 trillion was lost in developing regions due to illicit financial flows between 2000 and 2009, which is ten times more than those regions received in foreign aid,⁵ and roughly the annual GDP of China in 2012.⁶

The cost of corruption is not limited to poorer countries, however. In 2011, Global Financial Integrity found that Russia had the third largest outflow of illicit capital in the world, and bribery, theft, kickbacks, and corruption had cost Russia \$427 billion from 2000 to 2008.⁷ In 2010, a World Bank working paper estimated that Russia's corruption-fueled "shadow economy" constituted 43.6% of the country's GDP.⁸

Corruption also creates a political climate in which organized crime and terrorist organizations thrive. For example, drug lords operate easily in Mexico with the protection of corrupt officials, including law enforcement officers. Similarly, al Qaeda long found safe havens in countries characterized by corruption such as Afghanistan and Yemen.

Nevertheless, the greatest consequence of grand corruption is not its economic cost or the protection it provides to criminals. Grand corruption is most significant because it destroys

4 Int'l Chamber of Com. et al., *Clean Business is Good Business 2* (2008), available at <http://www.weforum.org/pdf/paci/BusinessCaseAgainstCorruption.pdf>; see also *The Costs of Corruption*, World Bank (Apr. 8, 2004), <http://go.worldbank.org/LJA29GHA80>.

5 Dev Kar & Sarah Freitas, *Illicit Financial Flows from the Developing World Over the Decade Ending 2009*, Global Fin. Integrity (Dec. 15, 2011), <http://www.gfintegrity.org/report/illicit-financial-flows-from-the-developing-world-over-the-decade-ending-2009/>.

6 *GDP (Current US\$)*, World Bank, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?display=default>.

7 Dev Kar & Sarah Freitas, *Global Fin. Integrity, Illicit Financial Flows from Developing Countries over the Decade Ending 2009*, at 12 tbl.C (2011), available at http://www.gfintegrity.org/storage/gfip/documents/reports/IFFDec2011/illicit_financial_flows_from_developing_countries_over_the_decade_ending_2009.pdf.

8 Friedrich Schneider et al., *Shadow Economies All Over the World* 23 tbl.3.3.3 (World Bank Dev. Res. Grp., Working Paper No. 5356, 2010), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2010/10/14/000158349_20101014160704/Rendered/PDF/WPS5356.pdf.

democracy and is devastating to the human rights that governments are constituted to protect.

People throughout the world increasingly share the understanding, expressed in the American Declaration of Independence:

that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.— That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed⁹

No nation's citizens have consented to the abuse of public office for personal profit. Corruption is a violation of the right to honest government which is essential to protecting and promoting the most fundamental human rights.

This truth is being increasingly recognized. In 2013, the United Nations High Commissioner for Human Rights, Navi Pillay, stated: “[C]orruption is an enormous obstacle to the realization of all human rights—civil, political, economic, social and cultural, as well as the right to development. Corruption violates the core human rights principles of transparency, accountability, non-discrimination and meaningful participation in every aspect of life of the community.”¹⁰

Moreover, corruption is not a victimless crime. Rather, “[v]ulnerable people—hated because they look or sound different, worship another God, or once came from somewhere else—rely on the rule of law for their safety and survival. When the rule of law is replaced by graft, the outcome for the weakest among us is too often catastrophic.”¹¹ This contention is confirmed by the Corruption Perception Index, which ranks Somalia and Afghanistan tied for last (175/175), followed closely by Sudan (174), Iraq (171), Syria (168), and the Democratic Republic of the Congo (154).¹²

In view of the universal right to honest government, and the close correlation between grand corruption and egregious abuses of the most fundamental human rights, the White House

9 The Declaration of Independence para. 2 (U.S. 1776).

10 Navi Pillay, *Opening Statement by Navi Pillay, High Commissioner for Human Rights: Panel on “The Negative Impact of Corruption on Human Rights,”* Off. of the High Commissioner for Hum. Rts. (Mar. 13, 2013), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13131&LangID=e>.

11 Richard L. Cassin, *Rampant Graft and the Risk of Atrocities*, FCPA Blog (May 15, 2014, 7:28 AM), <http://www.fcpablog.com/blog/2014/5/15/rampant-graft-and-the-risk-of-atrocities.html>.

12 *Corruption Perceptions Index 2013*, Transparency Int’l, <http://cpi.transparency.org/cpi2013/results/> (last visited July 1, 2014).

National Security Strategy of 2010 appropriately characterized corruption as “a violation of basic human rights.”¹³

Because corruption is a perversion of the purpose for which governments are constituted, it is not surprising that current events demonstrate the universal and enduring wisdom of Supreme Court Justice Louis Brandeis’ observation that:

[G]overnment is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.¹⁴

People around the world, particularly younger people, are now demonstrating that grand corruption will not be tolerated and, indeed, will incite unrest, if not revolution. For example, “[t]he runaway corruption of [Viktor] Yanukovich’s rule—and the cynicism that it symbolised—was one of the motors of the Maidan protests that toppled him from power.”¹⁵ After Yanukovich fled, “[t]he pictures of the former president’s plush compound—his vintage car collection and fancy pheasants, the private restaurant and golf course—[] struck a chord in the same way the palaces of Ben Ali and the wealth of Hosni Mubarak angered the people of Tunisia and Egypt.”¹⁶

A CULTURE OF IMPUNITY: THE CHALLENGE OF CONFRONTING CORRUPTION

Powerful, corrupt leaders understandably do not permit the honest, energetic investigation and prosecution of their friends, families, and, indeed, themselves. Rather, to perpetuate the culture of impunity on which corruption depends, they often prompt the persecution of those who expose official misconduct. For example, President Goodluck Jonathan of Nigeria dismissed the country’s bank governor after the governor informed the Nigerian Senate that the treasury was missing billions of dollars in expected oil revenue.¹⁷

13 The White House, National Security Strategy 38 (2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf; see also Andrew Brady Spalding, *Corruption, Corporations, and The New Human Right*, Wash. U. L. Rev. (forthcoming 2014).

14 *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

15 *The Curse of Corruption in Ukraine: Ostrich Zoo and Vintage Cars*, Economist, June 14, 2014, available at <http://www.economist.com/news/europe/21604234-fight-against-corruption-steep-uphill-battle-ostrich-zoo-and-vintage-cars>.

16 Oleksii Khmara, *Viktor Yanukovich is Gone, But Where are Ukraine’s Missing Millions?*, Guardian (Feb. 25, 2014, 6:35 AM), <http://www.theguardian.com/commentisfree/2014/feb/25/viktor-yanukovich-gone-where-ukraine-missing-millions>.

17 Adam Nossiter, *Governor of Nigeria’s Central Bank is Fired After Warning of Missing Oil Revenue*, N.Y. Times, Feb. 21, 2014, at A4, available at <http://www.nytimes.com/2014/02/21/world/africa/governor-of-nigerias-central-bank-is-fired-after-warning-of-missing-oil-revenue.html>.

Similarly, Russia does not pursue investigations of corruption by its officials even when presented with compelling evidence of it. In April 2010, Daimler AG and its subsidiaries pled guilty in Washington, D.C. to violating the United States Foreign Corrupt Practices Act (“FCPA”) by, among other things, paying more than €3 million in bribes in Russia for contracts for vehicles.¹⁸ Daimler’s Russian subsidiary paid a \$27 million fine and agreed to cooperate in future investigations.¹⁹ The evidence was provided to the Russian government. After anti-corruption advocate Aleksei Navalny publicized the matter, then Russian President Dmitri Medvedev pledged to pursue it.²⁰ However, four years later, no Russian official has been prosecuted.

Similarly, in 2008, Siemens AG was accused of paying \$1.4 billion in bribes around the world, including more than \$55 million in Russia.²¹ Siemens agreed to pay a \$450 million fine and to disgorge \$350 million in profits to settle the case and related criminal charges.²² Siemens’ subsidiaries in Russia were barred from World Bank projects for four years.²³ Germany released the names of twelve Russian officials reportedly bribed by Siemens.²⁴ Yet none of them have been prosecuted either.

Rather, in Russia, as in Nigeria, it is often those who expose corruption who are punished. Sergei Magnitsky was probing the embezzlement of \$230 million from his client, Hermitage Capital, when he was arrested for alleged tax fraud, was denied medical care in prison, and died there.²⁵ Similarly, Navalny was prosecuted and convicted on corruption charges that had previously been abandoned twice, after he exposed substantially inflated payments evidencing kickbacks by Russia’s Gazprom and VTB Bank, and revealed that the head of the Russian Investigative Committee, which directed his prosecution, had a hidden interest in real estate in the Czech Republic, where he had Permanent Resident status.²⁶

18 Press Release, U.S. Dep’t of Justice, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay \$93.6 Million in Criminal Penalties (Apr. 1, 2010), *available at* <http://www.justice.gov/opa/pr/2010/April/10-crm-360.html>; Information ¶19, *United States v. Daimler AG*, No. 1:10-cr-00063-RJL (D.D.C. Mar. 22, 2010).

19 See Press Release, U.S. Dep’t of Justice, *supra* note 18.

20 *This is How We Roll: Russians Learn How to Pronounce FCPA*, Russia Monitor (May 4, 2010), <http://therussia-monitor.com/2010/05/04/this-is-how-we-roll-russians-learn-how-to-pronounce-FCPA/>.

21 Compl. ¶¶60, 63, *SEC v. Siemens Aktiengesellschaft*, No. 1:08-cv-02167-RJL (D.D.C. Dec. 12, 2008).

22 Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), *available at* <http://www.sec.gov/news/press/2008/2008-294.htm>.

23 Press Release, Siemens AG, Legal Proceedings (Apr. 29, 2010), *available at* <http://www.siemens.com/press/pool/de/events/corporate/2010-q2/2010-q2-legal-proceedings-e.pdf>.

24 Andrew E. Kramer, *Russia Slow to Pick Up the Lead in Bribery Cases*, N.Y. Times (Apr. 29, 2010), <http://www.nytimes.com/2010/04/30/business/global/30ruble.html>.

25 Ellen Barry, *Lawyer Held in Tax Case in Russia Dies in Jail*, N.Y. Times, Nov. 18, 2009, at A10, *available at* <http://www.nytimes.com/2009/11/18/world/europe/18russia.html>.

26 Julia Ioffe, *Net Impact: One Man’s Cyber Crusade Against Russian Corruption*, New Yorker (Apr. 4, 2011), http://www.newyorker.com/reporting/2011/04/04/110404fa_fact_ioffe; Nataliya Vasilyeva, *Activist Presses Russian Corpo-*

In many countries, the only high level officials prosecuted for corruption are those who have fallen from favor and whose incapacitation will serve partisan purposes. For example, in China, President Xi Jinping has made his rival, Zhou Yongkang, and his family a target of a high profile corruption investigation because, some believe, “Mr. Xi regarded [Mr. Zhou] as a direct threat to his power. In other words, Mr. Zhou is the loser in a political struggle. His family’s financial dealings lost their immunity only because Mr. Zhou fell from favor”²⁷

Similarly, while Egyptian President Hosni Mubarak was long regarded as corrupt, he was only convicted of embezzling many millions of dollars of public funds for his personal use in lavish homes and palaces in May 2014, after he was removed from office, convicted of directing the killing of hundreds of protestors, and granted a new trial on appeal. Mubarak’s recent conviction for grand corruption has been reported to be an effort to “spare the government installed last summer by the country’s defense minister . . . a potential embarrassment: the chance that Mr. Mubarak might be a free man again.”²⁸

Grand corruption in many countries is supported by the quiet complicity of other nations, which benefit from foreign investment and official favor. Corruption results in the expatriation of billions of dollars annually. Officials place some of the proceeds of their crimes where they can be enjoyed. This is possible only because existing anti-corruption and money laundering measures are not vigorously or consistently enforced.

For example, in 2006, Prime Minister Tony Blair ordered the termination of an investigation of alleged bribes paid by a British weapons firm, BAE Systems, in Saudi Arabia after that nation threatened to break diplomatic relations with the United Kingdom.²⁹ Ultimately, those bribes were proven in an FCPA prosecution in the United States.

The more recent experience of the Ukraine is also illustrative. As the *Guardian* has reported:

The Ukrainian elites have for years salted away ill-gotten gains throughout the EU while the authorities, specifically in the UK, Germany, Austria, the Netherlands, Switzerland and Latvia, failed to apply their anti-corruption and anti-money laundering legislation to stop them.

rations for Openness, Bos. Globe (April 1, 2010), http://www.boston.com/business/articles/2010/04/01/activist_presses_russian_corporations_for_openness/; Andrew E. Kramer, *Putin Aide Said to Hold Secret Assets in Europe*, N.Y. Times, July 27, 2012, at A4, available at <http://www.nytimes.com/2012/07/27/world/europe/in-russia-aleksei-navalny-accuses-chief-investigator-of-secret-european-holdings.html>.

²⁷ Michael Forsythe et al., *Investigating Family’s Wealth, China’s Leader Signals a Change*, N.Y. Times, April 20, 2014, at A1, available at <http://www.nytimes.com/2014/04/20/world/asia/severing-a-family-ties-chinas-president-signals-a-change.html>.

²⁸ David D. Kirkpatrick, *Mubarak Gets 3 Years for Embezzlement, and His Sons Get 4*, N.Y. Times, May 22, 2014, at A8, available at <http://www.nytimes.com/2014/05/22/world/middleeast/hosni-mubarak-trial.html>.

²⁹ Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln’s Law Abroad*, Law & Contemp. Probs., Autumn 2007, at 109, 120.

Although the UK government estimates that £23bn-£57bn a year might be laundered through its financial centre, it issued the first fine for lax anti-money laundering controls in January [2014]. The UK branch of Standard Bank Group was fined \$12.6m—less than 2% of its 2013 first-half earnings.

According to a report by Transparency International UK, the global anti-corruption movement, there is a “tendency to tackle corruption only where there is strong bilateral political support.”

In other words, the British government is reluctant to charge foreign citizens with money laundering without the explicit approval and co-operation of that citizen’s government. How is this system supposed to work if it is the government officials that are stashing cash and buying villas in faraway places around the world?

The real world consequences of this policy are obvious: the only foreign citizens in danger of investigation, let alone prosecution—Ukrainian or otherwise—are those out of favour with their home governments. Those shielded from prosecution in Ukraine are automatically afforded the same protection in the UK and elsewhere.³⁰

A WAY FORWARD: AN INTERNATIONAL ANTI-CORRUPTION COURT

The inadequacy and ineffectiveness of national and international efforts to combat grand corruption demonstrate the need for a new approach. In 2012, drawing on my experience in the Department of Justice and as a federal judge, I outlined the case for an International Anti-Corruption Court at the St. Petersburg International Legal Forum, in part by explaining how we contend with corruption in the United States.

As I said, Watergate demonstrated that in the United States every person, even the President, must obey the law and court orders, and will be investigated if there are legitimate suspicions about his conduct. I also described how corruption had been found to be “a way of life”³¹ in public contracting in Massachusetts in the 1970’s, and how I had been rewarded with a Presidential appointment as a judge after the team of federal prosecutors I led for four years achieved more than 40 consecutive convictions in public corruption cases.

I also discussed the then recent trial of the former Speaker of the Massachusetts House of Representatives, which resulted in my sentencing him to serve eight years in prison for

³⁰ Khmara, *supra* note 16.

³¹ John William Ward et al., *Final Report to the General Court of the Special Commission Concerning State and County Buildings* 21 (1980).

extorting bribes in connection with computer contracts worth \$17 million. The case was started by a disappointed bidder, who expected a fair process and suspected impropriety. His complaint to the state Inspector General led to the discovery of flaws in the award of the contract and its invalidation. As a result of the Inspector General's public decision, the *Boston Globe* investigated for months and reported that the winning bidder had been paying the Speaker's law partner \$5000 a month, with most of the money going to the Speaker. Federal, not state, prosecutors and the Federal Bureau of Investigation then continued the investigation. They found hundreds of thousands of dollars had also been paid to a friend of the Speaker. When the Speaker was charged in federal court, the case was randomly assigned to me. A jury found the Speaker was proven guilty. I sentenced him to serve eight years in prison, in part because his two immediate predecessors had been convicted on more minor charges and not incarcerated.

As I explained in Russia, the resources that made the successful prosecution of the former Speaker possible in the United States exist in few other countries. In many nations lawmakers enact legislative immunities that prohibit investigations unless the Parliament itself authorizes them. At a minimum, this eliminates the opportunity for secret investigations and frequently blocks any investigation at all. Indeed, in many nations legislation prohibits undercover operations, wiretapping, or consensual recording of conversations, which are often essential to proving crimes that are structured to be difficult to detect and prove.

Few countries have an independent media, in part because, in contrast to the United States, journalists risk being ordered by courts to pay substantial litigation costs and libel judgments if they report on official misconduct. As is now occurring in Turkey, prosecutors and judges can be removed from office by the targets of their investigations if they act independently and impartially.³² In any event, investigators and prosecutors generally lack the training, experience, and tools to conduct complex financial investigations or to present their cases capably in court. Few countries use jurors to decide criminal cases, although jurors are harder for officials to influence than judges, who in many countries take direction from those in power and thus administer the kind of "telephone justice" that is infamous in Russia.

There have been positive developments in the international effort to combat corruption. There are now innumerable organizations that do exceptional work in exposing corruption, aided greatly by their ability to use the Internet to document and disseminate information which traditional, government-controlled media will not report. In addition, certain international institutions, such as the World Trade Organization ("WTO") and the European Union, require the adoption of national laws and the creation of national agencies to combat corruption as conditions for membership.

³² Andrew Finkel, *The Filth in Erdogan's Closet*, N.Y. Times (Dec. 27, 2013), <http://www.nytimes.com/2013/12/28/opinion/the-filth-in-erdogans-closet.html>.

At the 2013 St. Petersburg International Legal Forum, experts from the United Nations, the Organization for Economic Cooperation and Development (“OECD”), and the European Union praised the Russian Federation for the laws and regulations it has enacted. However, as I said at the same program, there is substantial evidence to support Global Integrity’s finding that there is a significant “implementation gap”³³ between the measures Russia, among others, has adopted and the rampant grand corruption that remains.

Russia exemplifies why an International Anti-Corruption Court, modeled on or as part of the International Criminal Court, is needed. As described earlier, the International Criminal Court was established because some states were unwilling or unable to prosecute violations of human rights in nations whose leaders were the primary perpetrators of genocide, crimes against humanity, and war crimes. The ICC was established as an alternative forum for the prosecution of these crimes. It is constituted only to complement national systems. If a country is willing and able to investigate and prosecute violations of human rights, the ICC defers to it.

Similar principles should be the foundation of an International Anti-Corruption Court. Grand corruption is a crime in virtually every country. It is also a violation of the United Nations Convention Against Corruption, which more than 100 countries have ratified, and the OECD Convention on Combating Bribery of Foreign Officials, which 40 nations, including Russia, have signed. A commitment to combat grand corruption is also a requirement of membership in the WTO. Grand Corruption should, like those offenses now within the jurisdiction of the ICC, be expressly made, or recognized as, criminal violations of international law as well. In any event, an International Anti-Corruption Court would only be a new forum for prosecuting violations of universal, existing obligations of honesty, rather than a place for the enforcement of new norms.

An International Anti-Corruption Court would require the creation and employment of an elite corps of investigators who are expert at unraveling complex financial transactions, and prosecutors experienced in preparing and presenting complicated cases. It should also include experienced, impartial judges. Like the ICC, the International Anti-Corruption Court should operate on the principle of complementarity.

In addition, the International Anti-Corruption Court should, like federal courts in the United States, be empowered by international law to hear civil fraud and corruption cases brought by private “whistleblowers.”³⁴ The United States False Claims Act authorizes *qui tam* actions by private citizens, who sue on behalf of the United States those who have allegedly defrauded

33 *Global Integrity Report 2010: Russian Federation*, Global Integrity, <https://www.globalintegrity.org/global/the-global-integrity-report-2010/>.

34 Carrington, *supra* note 29, at 130.

the government.³⁵ A successful *qui tam* action can result in an award of treble damages against the perpetrator of fraud against the government, which in some cases involves the payment of bribes. If the Department of Justice takes over the prosecution of the claim, the private “relator” who initiated the action is entitled to a substantial payment from any settlement or judgment. If the Department of Justice declines to intervene and the suit is settled or won, the relator receives at least 25% of the amount recovered for the government, which at times provides a payment of hundreds of millions of dollars.

In contrast to criminal cases, which require proof beyond a reasonable doubt to obtain a conviction, a civil fraud charge must be proved only by a preponderance of the evidence and is, therefore, easier to establish. Relators’ lawyers typically work on a contingent fee basis. Thus, lawyers are available to private citizens who are financially unable to match the companies being sued. In addition, under the American system, a relator who brings an unsuccessful claim does not usually have to pay the prevailing defendant’s attorneys’ fees.

All of these features of the False Claims Act greatly expand the resources devoted to combating fraud against the United States, including fraud perpetrated with the collusion of corrupt officials, and minimize the risk that politically powerful government contractors will succeed in keeping well-founded cases from being brought against them by the Department of Justice. As a result, in nine thousand False Claims Act cases between 1987 and 2005, the United States recovered \$15 billion, two-thirds of which came from cases first brought by private citizens.³⁶

A comparable international civil statute, enforceable in the International Anti-Corruption Court, would create a powerful incentive for whistleblowers, greatly enhance the resources devoted to combating fraud and corruption, and enhance the potential for restitution for its victims.³⁷

In any event, submission to the jurisdiction of the International Anti-Corruption Court should be incorporated in the United Nations Convention Against Corruption. It should also be made a condition of membership in international organizations such as the OECD and WTO, and for obtaining loans from international lenders such as the World Bank. Similarly, among other new measures to combat corruption being discussed in the current negotiations of the fifth round of the Transatlantic Trade and Investment partnership, participation in an International Anti-Corruption Court should be included, which would then serve as a model for other trade treaties.³⁸

35 False Claims Act, 31 U.S.C. §§3729-3733.

36 Carrington, *supra* note 29, at 127.

37 *Id.*

38 Colette van der Ven, *The TTIP Is an Ideal Opportunity to Strengthen Anticorruption Measures*, Global Anticorruption Blog (May 18, 2014), <http://globalanticorruptionblog.com/2014/05/18/the-ttip-is-an-ideal-opportunity-to-strengthen-anticorruption-measures/>.

The threat of prosecution in the International Anti-Corruption Court would give many nations an incentive to strengthen their capacity to prosecute grand corruption. If a state demonstrates the determination and ability to prosecute grand corruption itself, the principle of complementarity would preclude prosecution of its officials in the International Anti-Corruption Court. An International Anti-Corruption Court should, therefore, encourage efforts to establish specialized national anti-corruption courts in countries in which judges are often corrupt, such as the court now Prime Minister Dmitri Medvedev has discussed for Russia.

It may be argued that an IACC would violate national sovereignty. However, the FCPA, and comparable statutes enacted in other countries, already create a form of universal jurisdiction for the bribery of foreign officials. Multilateral decisions would be required to initiate a prosecution in an International Anti-Corruption Court. Prosecution in The Hague, or some similar venue, should be a less offensive incursion on national sovereignty than an FCPA prosecution in the United States based on the decision of a single country.

There are other foreseeable arguments against the establishment of an International Anti-Corruption Court. Some members of the international human rights establishment may fear that increasing attention to corruption will diffuse the focus on genocide and other crimes against humanity.³⁹ However, it should instead be recognized that, as the then United Nations High Commissioner for Human Rights recently explained, “corruption is an enormous obstacle to the realization of all human rights.”⁴⁰ Therefore, as she correctly contended, “[t]here is an urgent need to increase the synergy between efforts to implement the United Nations Convention Against Corruption and international human rights conventions.”⁴¹ Indeed, “[t]he international anti-corruption movement has the potential to enhance and augment human rights rhetoric enormously. Both movements rely on arguments about justice and the rule of law, and both appeal to the human instinct for fairness.”⁴²

Moreover, recognizing the link between grand corruption and abuses of human rights has the potential to lead to the more effective prosecution and punishment of perpetrators of those abuses. High-level officials responsible for genocide, for example, typically operate through subordinates and allies, making their criminal culpability difficult to prove by the eyewitness testimony of victims. However, the money laundering frequently associated with grand corruption can often be proven based on more easily acquired documentary evidence alone. Therefore, if an IACC is established and empowered to decide cases involving bribery and other

39 Karen Alter & Juliet Sorensen, *Let Nations, Not the World, Prosecute Corruption*, U.S. News & World Rep. (Apr. 30, 2013, 3:45 PM), <http://www.usnews.com/opinion/articles/2014/04/30/dont-add-corruption-to-the-international-criminal-courts-mandate>.

40 Pillay, *supra* note 10.

41 *Id.*

42 Anne Applebaum, *A Global Human Rights Opportunity*, Wash. Post, Dec. 15, 2012, at A19.

financial crimes, it should be possible to successfully prosecute and punish powerful officials for crimes relating to corruption when it would not be possible to do so for genocide, war crimes, or crimes against humanity. This would be comparable to the experience in the United States, where members of the Mafia and other dangerous criminals are sometimes convicted and imprisoned for tax evasion when their violent crimes cannot be proven.

It may be argued that the performance of the International Criminal Court does not justify either expansion of its jurisdiction or emulation. The initial work of the ICC has been ponderously slow; it took more than six years to try the first suspect captured, Thomas Lubanga of the Congo, and his appeal is still pending.⁴³

In addition, the ICC has been criticized as a form of Western imperialism because its prosecutions have focused solely on Africa. However, this is attributable, in part, to the facts that: thirty-three African states joined the court, the most from any region; genocide and crimes against humanity have occurred repeatedly in Africa since the ICC was created in 2002; and the culture of impunity is particularly pronounced in African nations.⁴⁴ Nevertheless, it is true that the ICC has not opened full investigations into violence in countries such as Afghanistan, Iraq, or Myanmar, where the United States and other members of the United Nations Security Council have strong interests.⁴⁵

However, an International Anti-Corruption Court should have at least one major advantage over the ICC—the support of the United States. The United States has not joined the ICC and initially used its power to restrict the ICC’s efforts because of a fear that United States citizens would be prosecuted there despite the principle of complementarity which should preclude such cases.

In contrast, the United States has good reason to fully support an International Anti-Corruption Court. American companies generally behave ethically and, in any event, are significantly deterred from paying bribes by the threat of prosecution for violating the FCPA. They would benefit from the more level international playing field an IACC would provide.

Undoubtedly, other practical, and perhaps principled, arguments can be made against the creation of an IACC. However, again, Secretary General Annan was right when he wrote that corruption is an “insidious plague” that destroys the capacity of government to protect the rights and improve the plight of the people it is constituted to serve. Grand corruption depends

43 Wairagala Wakabi, *Age of Soldiers at Center of Lubanga Appeals Hearing*, Int'l Justice Monitor (May 20, 2014), <http://www.ijmonitor.org/2014/05/age-of-soldiers-at-center-of-lubanga-appeals-hearing/>.

44 David Bosco, *Justice Delayed*, Foreign Pol'y, June 29, 2012, available at http://www.foreignpolicy.com/articles/2012/06/29/justice_delayed.

45 *Id.*

upon a culture of impunity that many nations have been unwilling or unable to end. The efforts of the international community have not been sufficient or successful. People, especially young people, throughout the world are now demonstrating that grand corruption is intolerable. They are increasingly exposing and protesting it at great personal peril.

For these people, the best hope is an international forum for the effective prosecution of grand corruption, eroding the culture of impunity, and contributing to the opportunity for democratic elections to produce honest officials with the will to serve the public good in countries which have long been led by corrupt criminals. The effort to establish an International Anti-Corruption Court will both encourage and engage these courageous people. If and when the effort succeeds, their courage will be rewarded. If the effort fails, at least they, and the democratic ideal of honest government that inspires them, will have been honored by the international community.

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